

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Subsection 632(b)
Title 14, California Code of Regulations
Re: Commercial Lobster Fishing in Dana Point State Marine Park

I. Date of Initial Statement of Reasons: June 7, 2006

II. Dates and Locations of Scheduled Hearings:

(a)	Notice Hearing:	Date:	June 23, 2006
		Location:	Mammoth Lakes, CA
(b)	Discussion/Adoption Hearing:	Date:	August 25, 2006
		Location:	Santa Barbara, CA

III. Description of Regulatory Action:

(a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

The Fish and Game Commission (hereafter Commission) proposes to authorize commercial lobster fishing in the area referred to as the "Dana Point Marine Life Refuge" in Section 10907 of the Fish and Game Code (hereafter FGC), which is also the area referred to as the "Dana Point State Marine Park" in Subsection 632(b)(72), Title 14, CCR. Members of the lobster fishing industry have expressed to the Commission that the area is economically important to their livelihood.

The area spans approximately 0.56 nautical miles of coastline around Dana Point, and extends offshore 1200 feet from the mean high tide line, encompassing approximately 0.16 square nautical miles. It falls entirely within the 70 square nautical-mile area of commercial fishing block number 757 (Figure 1).

In order to allow for commercial lobster fishing, the Commission proposes to change the designation established in its regulations in Subsection 632(b)(72), so that the area would become the "Dana Point State Marine Conservation Area" instead of the "Dana Point State Marine Park."

In a state marine conservation area, the Commission may permit certain commercial and recreational harvest of marine resources, provided that these uses do not compromise protection of the species of interest, natural community, habitat, or geological features. Conversely, in a state marine park, the Commission may authorize recreational harvest, but it is unlawful to injure, damage, take, or possess any living or nonliving marine resource for commercial exploitation purposes.

Section 632, Title 14, CCR presently defines 84 marine protected areas (MPAs) and special closures that span California's coastline. The regulations also designate each of the 84 areas as a special closure, a state marine reserve, a state marine park, or a state marine conservation area. The Dana Point State Marine Park is MPA number 72.

Figure 1. Dana Point State Marine Park including surrounding commercial fishing blocks.



1. Statutory History of the Dana Point Marine Life Refuge

In 1957, subdivision (f) of Section 10500 was added to the FGC, making it unlawful for any person to take or possess any invertebrate or specimen of marine plant life in a "Marine Life Refuge, except under a permit or special authorization." Also in 1957, and subsequently in 1965, 1968, 1969, 1971, 1988

and 1989, the Legislature established 13 such Marine Life Refuges and defined the specific boundaries of these areas in FGC Sections 10900 et Seq. These statutes are found in Article 6 of Chapter 2, Division 7 of the FGC, entitled "Marine Life Refuges." Section 10907, defining the Dana Point Marine Life Refuge, was added in 1969.

The legislation establishing the Dana Point Marine Life Refuge also added the area, along with the Doheny Beach Marine Life Refuge, to a list of three other statutorily-established Southern California marine life refuges in Section 10664 of the FGC. This Section allows take, under authority of a sportfishing license, of certain fish, mollusks, and crustaceans, in these particular refuges. However, the text of this Section also specifies that in these areas, "All other fish and forms of aquatic life are protected and may not be taken without a written permit from the Department."

In 1993, the Legislature re-affirmed its intent to maintain the Dana Point Marine Life Refuge (S.B. 716, ch. 256, Stats. 1993) and amended the laws to add additional restrictions. The legislation removed Dana Point from the list of refuges enumerated in Section 10664, and established FGC Section 10667, which provided additional take and access restrictions specific only to the Dana Point Marine Life Refuge.

Section 10667 remains effective today, allowing take, under authority of a sportfishing license, of certain fish, mollusks, and crustaceans, but only in areas below the intertidal zone. Additional language limits use of the intertidal zone to only certain "minimum impact" activities, and also specifies that "All other fish and forms of aquatic life are protected and may not be taken without a written permit from the Department." This language, consistent with the language of Subdivision 10500(f), prohibits commercial fishing in the Dana Point Marine Life Refuge, except under a permit from the Department.

Members of the California Lobster and Trap Fishermen's Association have explained that shortly after the creation of the Dana Point and the other six Orange County marine life refuges, such a "permit from the Department" was provided by then Director Fullerton to authorize commercial lobster fishing for certain individuals in these areas. The authorization provided evidently was in the form of a letter from the Director, to the individual permittees. The letter or letters have not been recovered.

The Department Directors that followed Mr. Fullerton did not subsequently re-authorize such permits, although no requests were made to do so. It appears that from that time until 2005, Department wardens did not enforce the prohibition on commercial take in the refuge, recognizing this former "gentleman's agreement." However, in recent years, the Department has determined that allowing commercial harvest in the Dana Point Marine Life Refuge would be

inconsistent with the intent and spirit of the legislation that established this particular marine refuge, and with the legislative acts that subsequently followed.

In making this determination, the Department relies upon Section 10502.6 of the FGC, enacted with the 1993 legislation. Subdivision (a) of this Section authorizes the Director to appoint a Director of the Dana Point Marine Life Refuge, and subdivision (c) of this Section further states: “The Director of the Dana Point Marine Life Refuge may issue a permit authorizing any person to enter the Dana Point Marine Life Refuge for the purpose of taking fish or marine plants under the conditions that the Department determines to be *necessary for the protection and propagation of fish and wildlife and related scientific purposes in that refuge.*” Furthermore, none of the various pieces of legislation that define any of the marine life refuge boundary areas or provide special provisions for use or access in these areas made mention of allowing commercial fishing, either under a special permit or otherwise.

2. Marine Managed Areas Improvement Act (MMAIA, Stats. 2000, ch. 385)

In 2000, the Legislature adopted the MMAIA, codified in Sections 36600 through 36900 of the Public Resources Code (hereafter PRC). The Act is incorporated by reference into the FGC pursuant to Section 1591.

The legislative findings and declarations, described in Section 36601 of the PRC, explain that establishment of marine managed areas (MMAs) throughout California had been done in piecemeal fashion over the past 50 years by several legislative or quasi-legislative entities at both state and local levels. The MMAIA calls for agencies to work together to establish a standardized approach to MMAs, with a properly designed and coordinated system. Specifically, the legislation required that all existing and future MMAs be reclassified or classified as a state marine reserve, a state marine park, a state marine conservation area, a state marine cultural preservation area, a state marine recreational management area, or a state water quality protection area (Section 36700, PRC). Three of these classifications (state marine reserve, state marine park, and state marine conservation area) are defined by the MMAIA as MPAs (Section 36602(e), PRC).

Section 36750 of the PRC further provides that the reclassification shall be “based upon the management purpose and level of resource protection at each site...Upon the reclassification of existing sites...the use of all other classifications shall cease for the marine and estuarine environments of the state.”

Subdivision 36725(a) of the PRC, and Section 1590 of the FGC (also adopted as part of the MMAIA), provide authority to the Fish and Game Commission to undertake this reclassification process, as it may “designate, delete, or modify

state marine recreational management areas established by the Commission for hunting purposes, state marine reserves, and state marine conservation areas.” It should be noted that the statute does not explicitly state that the Commission’s authority extends to areas *established by legislation*, although that could well be implied from a reading of the MMAIA in its entirety.

Notably, however, the Legislature did not itself reclassify the statutorily-established marine life refuges in Article 6 of Chapter 2, Division 7 of the FGC at the time it adopted the MMAIA. Nor has it taken action since to remove any of the legislatively-created areas from the statutes.

3. MMAIA Re-Classification Exercises by the Fish and Game Commission

In 2004, the Department and Commission undertook to re-designate the state’s existing array of MPAs following the classification scheme identified in Section 36700 of the PRC (OAL ID # Z04-1005-08). In so doing, it followed the direction (Section 36750, PRC) to consider the management purpose and level of resource protection at each site. The statutory language defining and prescribing activities which may take place in the Dana Point Marine Life Refuge was most closely aligned with the definition of a “State Marine Park” provided in subdivision 36700(b) of the PRC, which allows for recreational but not commercial opportunities (Subdivision 36710(b), PRC).

The State Inter-Agency Coordination Committee, established by Section 36800, PRC, was charged with reviewing proposals for new or amended MMAs to ensure consistency in the use of designations throughout the state. The Committee reviewed the Department and Commission’s proposal to reclassify all existing MPAs in the state’s marine and estuarine waters, and to incorporate them into the Commission’s regulations in Subsection 632(b), Title 14, CCR. The State Inter-Agency Coordination Committee concurred with the proposed reclassifications prior to the Commission’s adoption of the regulations in December, 2004.

As a result, the area known as the Dana Point Marine Life Refuge was incorporated into the Fish and Game Commission’s regulations as the “Dana Point State Marine Park” in Section 632, Title 14, CCR. Other than the name, there is no difference between the regulations and the statutes that remain in the FGC. Along with the Dana Point MPA, the Commission also re-classified the six other Orange County marine life refuges as state marine parks as well.

Shortly thereafter in 2005, members of the California Lobster and Trap Fishery Association reminded the Department and the Commission that the “gentlemen’s agreement” had remained in effect until the present, whereby the statutory prohibition on commercial lobster harvest was not enforced in any of the Orange County marine life refuges. In response to this request, and recognizing that

these areas had been commercially fished for many years under the gentleman's agreement, the Department proposed, and the Commission adopted, a compromise package, recognizing that fishermen that relied on these areas could suffer a substantial economic hardship if all seven areas were all closed to commercial harvest. The proposal called for transforming six of the seven Orange County refuge areas to state marine conservation areas from state marine parks, thereby allowing commercial harvest, but limited the commercial activity to commercial lobster fishing only.

The Department selected to maintain the Dana Point area as the one MPA that should remain closed to commercial fishing due to the more specific nature of the restrictions provided in FGC Section 10667. This proposed change (OAL ID #s 05-0510-09 and 05-0621-16) became effective on November 2, 2005.

However, although commercial lobster fishing is now permitted in six of the seven areas, the fishermen who relied on waters within the Dana Point State Marine Park now request that the Commission re-classify the seventh area from a State Marine Park to a Marine Conservation Area, as it did for the other six Orange County refuge areas.

4. Current Understanding of MPA Modification Processes

Upon further review of the MMAIA and how it interrelates with the Marine Life Protection Act (MLPA) legislation (Ch. 1015, Stats. 1999), it appears that actions to modify existing MPAs must be consistent with the MLPA statutes. In the 2005 rulemaking (OAL ID #s 05-0510-09 and 05-0621-16) that reclassified the six other State Marine Parks to State Marine Conservation Areas, the authority cited was Section 1590 of the FGC, codified with adoption of the MMAIA.

However, the Department now does not believe Section 1590 of the FGC was the proper source of authority to "modify an MPA" when one is looking to modify an MPA that was originally designated by the Legislature, as opposed to one originally established by the Commission. This belief is founded upon express statutory provisions that suggest that the Commission must look to the entity that established the MPA before determining if they have authority to modify its original classification. For example, Subdivision 36725(a), PRC states that if the State Parks and Recreation Commission designates an MMA, the (Fish and Game) Commission may not have any authority to modify or delete the area, depending on its classification.

Moreover, as described in item 2 above, the plain language of Section 1590, may limit the Commission's ability to "designate, delete or modify" MPAs to only: a) state marine recreational management areas established by the Commission for hunting purposes, b) state marine reserves, and c) state marine conservation areas. No mention is made of legislatively-created marine life refuges. Moreover,

this language does not appear to allow for transformation of a state marine park into a state marine conservation area, since state marine parks are not identified in the list of items the Commission may “designate, delete or modify.”

Additionally, Subdivision 10502(d), codified in the general provisions pertaining to refuges and other protected areas, states that the Commission may make additional regulations *not in conflict with any law* for the protection of birds, mammals, fish, amphibian, and *marine life within any refuge*.

Most importantly, Section 2861 of the FGC, codified with the MLPA, entitled “Modification of MPAs,” which contains the following language:

(a) The Commission shall, annually until the master plan is adopted and thereafter at least every three years, receive, consider, and promptly act *upon petitions from any interested party, to add, delete, or modify MPAs*, favoring those petitions that are compatible with the goals and guidelines of this chapter.

(b) Prior to the adoption of a new MPA *or the modification of an existing MPA that would make inoperative a statute, the Commission shall provide a copy of the proposed MPA to the Legislature for review by the Joint Committee on Fisheries and Aquaculture* or, if there is no such committee, to the appropriate policy committee in each house of the Legislature. (emphasis added)

The Department now believes that Section 2860, established with the MLPA, which allows the Commission to regulate commercial and recreational fishing and any other taking of marine species in MPAs, along with Section 2861 which requires the Commission to annually review petitions to add, delete, or modify MPAs, are the statutes that are most on-point to address the situation at hand. This is a request from an interested party (lobster fishermen) to modify an existing MPA that was established by statute. Therefore, the Department believes that while the Commission clearly has authority to modify existing MPAs that it has previously created, special rules apply for those MPAs that were established by the Legislature itself, pursuant to FGC Subdivision 2861(b).

The Department recommends that the Commission proceed with providing a copy of the change to the Joint Committee on Fisheries and Aquaculture as described in FGC Subdivision 2861(b), prior to adoption of the proposed change to convert the Dana Point State Marine Park to the Dana Point State Marine Conservation Area, a change that is necessary in order to grant the industry’s request to allow commercial lobster harvest in the area.

5. Commercial Lobster Fishing Activity in the Dana Point MPA, 2000-2004

Members of the California Lobster and Trap Fisherman's Association have requested the proposed change based on a claim of economic hardship. If regulations continue to define the area as the Dana Point State Marine Park, commercial fishing, including lobster fishing, will remain prohibited. Presently, there are approximately 220 individuals that are authorized to fish for lobster in California, under authority of a commercial lobster operator permit.

It is common practice for individual lobster fishermen to fish with trap gear consistently in the same areas. Unlike coastal pelagic fisheries which are generally not affiliated with particular bottom types or areas, lobster fishing is done only in rocky reef or kelp forest habitat. Most lobster fishing in California takes place south of Point Conception in water less than 150 feet deep along the coast or at offshore islands.

All commercial lobster fishing must be done with traps. While there is no limit on the number of traps a commercial lobster permittee may use, traps must be serviced at least once every 96 hours, weather permitting, pursuant to FGC Section 9004.

Consequently, the lobster fishery can be described as one where access to specific areas is very important. Most lobster fishermen fish only in a few particular areas, and set their traps in densities based on their prior experience working the area. To maximize productivity, fishermen set traps in a way that strikes the best balance between too large a distance between traps (inefficient use of time and labor) and too little distance between traps (resulting in low yields per trap). While there is some amount of overlap in areas that fishermen work, it is relatively uncommon to see more than a few fishermen working a particular area, such as a specific reef, cove, point or kelp bed.

For those lobster fishermen that previously relied on the Dana Point MPA area as part of their "turf," continuing to lose the area to future commercial fishing would likely result in some degree of economic hardship. Meanwhile, a large majority of the 220 permitted lobster fishermen are not impacted by the closure, as their records show they have never fished in block 757. However, because commercial lobster fishing data are collected at the block scale and since the Dana Point State Marine Park only encompasses a small portion of block 757, the Department is unable to precisely quantify how many individuals previously fished the area, or how much the catch from this area may be worth.

6. Economic Impact Based on Landing Receipt Information

The Department requires that fishermen or buyers record the general location of where the catch was made on the fish receipt at the time of sale. Unfortunately,

commercial landing receipts do not have the resolution needed to determine if the catch was made inside or outside the Dana Point MPA. Landing receipts require only that the buyer list the “fishing block” where the catch was made.

The Dana Point MPA falls entirely within block 757, which includes about 70 square nautical miles of ocean area (see Figure 1). The Dana Point MPA encompasses only about 0.16 square nautical miles of this area. However, since lobster fishing generally only takes place in water less than 150 feet deep, most of the ocean area falling within block 757 is not utilized for lobster fishing. Therefore, in trying to determine what percentage of the block 757 catch might have originated from waters within the Dana Point MPA, it would be incorrect to consider the entire area of block 757. Only the shallow waters along the coast should be included in any calculation.

The Department has considered two possible ways to estimate the percentage of the block 757 catch attributable to the Dana Point MPA. First, all of the 0.16 square nautical miles inside the MPA area is 60 feet and less in depth, while 4.4 square nautical miles of the total area in block 757 is 60 feet and less, based on bathymetric information. That would mean about 3.6 percent of the block 757 area that is 60 feet and less in depth falls within the Dana Point MPA. Therefore, it is possible that about 3.6 percent of the block 757 catch comes from the Dana Point MPA, if all lobster catch in block 757 came from waters 60 feet and less, and all areas 60 feet and less were considered equal in terms of their habitat value for producing lobster.

Alternatively, looking at the length of coastline included within the Dana Point MPA relative to the length of coastline that falls in block 757 may be appropriate. The Dana Point MPA spans 0.56 nautical miles of coastline, while there is about 5.6 nautical miles of coastline in all of block 757 (see Figure 1). That would mean about 10 percent of the block 757 catch could have come from the Dana Point MPA if all areas of the coastline in the block were considered equal in terms of their habitat value for producing lobster.

However, the Department recognizes that in fact, not all of the water less than 60 feet, nor the entire block 757 coastline, is equal in terms of its habitat value for producing lobster. There are areas of rocky reef habitat in block 757 that fall both inside and outside of the Dana Point MPA that could support commercial lobster fishing. Likewise, there are areas of shallow sandy habitat in block 757 that occur both inside and outside the Dana Point MPA, which are not suitable for commercial lobster fishing. Therefore, the Department cannot say that either of the potential methods of calculation described above is very precise. However, the Department can say with certainty that it would be incorrect to attribute all of the block 757 catch as having originated from the Dana Point MPA.

Despite the impossibility of determining how many individuals previously fished in

the area, and what percentage of the block 757 catch comes from the Dana Point MPA, the landing receipt information that lists block 757 still provides some baseline information that may be helpful in determining the degree of economic impact that may result from continuing to close the area to commercial lobster fishing.

The Department evaluated commercial lobster landing receipts for four seasons (2000-2003), where each season begins in October and runs through the March of the following year. Catch information for the two most recent seasons was not included in the analysis because the new regulations closing the Dana Point area to commercial harvest were in effect during all or part of those seasons.

Over the 2000-2003 seasons, block 757 catch averaged just over 35,000 pounds per season, compared with an average statewide total of 695,000 pounds per season. Therefore, the catch from block 757 produces approximately 5% of the statewide total.

The median price paid to fishermen statewide over this 4-year period was \$7 per pound. Therefore, block 757 produced approximately \$245,000 worth of lobster in each of these seasons.

In the 2000 season, landing receipts with catches recorded as originating from block 757 showed that 28 individual permittees landed catch from this block area. In 2001-2003, there were 24, 25 and 22 individuals respectively. So, on average each season, 25 permittees fishing in block 757 earned a total of \$245,000 from the sale of their catch. If equally distributed this comes to about \$9,800 per permittee. The other approximately 195 lobster fishermen in the state did not participate in lobster fishing in block 757, and thus had no earnings from the area.

However, the landing receipts show that in fact, the catch was not equally distributed between the 25 individuals. In looking at the maximum possible economic loss to a single individual, the person with the highest catches from block 757 landed an average of just under 4,000 pounds in each of these four seasons, meaning that this individual would lose approximately \$28,000 per season if he or she could not catch that lobster from another location, and if all of those catches recorded from block 757 originated from waters within the Dana Point MPA.

7. Department Conclusions on Impacts

As described above, it may be reasonable to estimate that only 10 percent or less of the catch from block 757 comes from waters within the Dana Point MPA.

Therefore, if commercial lobster fishing were to remain closed in the Dana Point

MPA, the estimated degree of impact might be that 2.5 individuals would be impacted at a level of \$9,800 each per season, or alternatively, 25 individuals would be impacted at a level of \$980 each per season, or some combination in between. The highest potential impact to any individual could be no more than \$28,000 per year and, if so, the impact to other individuals would necessarily be less.

Given that usually only a few fishermen work a particular area such as the MPA, it is probably more likely that the impact would be to few individuals each at a greater degree. This estimate also assumes that catch could not be made from some other nearby location open to lobster fishing, although recent information from other MPAs suggests that when fishermen are faced with closed areas, they often mitigate by relocating to areas that remain open. Analyses of newly established MPAs have shown that lobster fishermen are able to land the same volume of lobster as they did prior to the closure.

However, even if 100 percent of the catch from block 757 came from the Dana Point MPA, the maximum impact would be approximately \$245,000 per year; about 5 percent of the total value of the fishery statewide.

In summary, the Department's evaluation of the economic impact of the present Dana Point State Marine Park designation to the lobster fishery as a whole is negligible, relative to the \$4.87 million average seasonal value of the fishery statewide.

8. Technical Changes to Subsection 632(b), Title 14, CCR

As described above, the Commission previously took action to re-classify the six other Orange County marine life refuges from state marine parks to state marine conservation areas (OAL ID #s 05-0510-09 and 05-0621-16), which became effective on November 2, 2005. Additional language is now proposed to make clear that the regulations established in Subsection 632(b), Title 14, CCR, supercede the statutes establishing these marine life refuges and prescribing the terms of their use.

The proposed addition to the regulatory language would make clear that that pursuant to the Commission's authority in Fish and Game Code Section 2860 to regulate commercial and recreational fishing and any other taking of marine species in MPAs, Fish and Game Code Sections 10500(f), 10500(g), 10502.5, 10502.6, 10502.7, 10502.8, 10655, 10655.5, 10656, 10657, 10657.5, 10658, 10660, 10661, 10664, 10666, 10667, 10711, 10801, 10900, 10901, 10902, 10903, 10904, 10905, 10906, 10907, 10908, 10909, 10910, 10911, 10912, 10913, and 10932 are made inoperative as they apply to Subsection 632(b).

(b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Section 2860, Fish and Game Code.

Reference: Section 2861, Fish and Game Code.

(c) Specific Technology or Equipment Required by Regulatory Change:

None.

(d) Identification of Reports or Documents Supporting Regulation Change:

None.

(e) Public Discussions of Proposed Regulations Prior to Notice publication:

Fish and Game Commission Marine Resources Committee Meeting,
March 24, 2006, Santa Barbara, CA.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change: The proposal to reclassify the Dana Point State Marine Park to a Marine Conservation Area in order to authorize commercial lobster fishing could be postponed until the Marine Life Protection Act planning process comes to Southern California. This process is expected to be completed no later than 2011 and may begin as soon as 2008. Regardless of whether or not this proposed change to accommodate a portion of the commercial lobster fleet is enacted, the Dana Point area will be reconsidered as part of the review and development of a regional approach to MPAs. However, postponement of this decision would not afford these fishermen the immediate relief they seek.

(b) No Change Alternative: Should the Commission select the No Change Alternative, commercial fishing for lobster within the Dana Point State Marine Park would continue to be prohibited, as is all commercial fishing within any state marine park. However, the area would still be reviewed during the MLPA process, though perhaps with less emphasis on this particular issue.

(c) Consideration of Alternatives: In view of information currently possessed, no reasonable alternative considered would be more effective

in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

None.

(b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

Negligible. The Department estimates that if the Dana Point State Marine Park is re-designated as the Dana Point State Marine Conservation Area in order to allow for continued commercial lobster fishing, there is potential for existing commercial lobster permittees to land an estimated \$24,500 worth of lobster each season from this particular area. See Section III(a) of this Initial Statement of Reasons.

(c) Cost Impacts on a Representative Private Person or Business:

See items (a) and (b) above.

(d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

(e) Nondiscretionary Costs/Savings to Local Agencies:

None.

(f) Programs mandated on Local Agencies or School Districts:

None.

(g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

(h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

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Figure 1. Dana Point State Marine Park including surrounding commercial fishing blocks.



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any of the marine life refuge boundary areas or provide special provisions for use or access in these areas made mention of allowing commercial fishing, either under a special permit or otherwise.

2. Marine Managed Areas Improvement Act (MMAIA, Stats. 2000, ch. 385)

In 2000, the Legislature adopted the MMAIA, codified in Sections 36600 through 36900 of the Public Resources Code (hereafter PRC). The Act is incorporated by reference into the FGC pursuant to Section 1591.

The legislative findings and declarations, described in Section 36601 of the PRC, explain that establishment of marine managed areas (MMAs) throughout California had been done in piecemeal fashion over the past 50 years by several legislative or quasi-legislative entities at both state and local levels. The MMAIA calls for agencies to work together to establish a standardized approach to MMAs, with a properly designed and coordinated system. Specifically, the legislation required that all existing and future MMAs be reclassified or classified as a state marine reserve, a state marine park, a state marine conservation area, a state marine cultural preservation area, a state marine recreational management area, or a state water quality protection area (Section 36700, PRC). Three of these classifications (state marine reserve, state marine park, and state marine conservation area) are defined by the MMAIA as MPAs (Section 36602(e), PRC).

Section 36750 of the PRC further provides that the reclassification shall be “based upon the management purpose and level of resource protection at each site...Upon the reclassification of existing sites...the use of all other classifications shall cease for the marine and estuarine environments of the state.”

Subdivision 36725(a) of the PRC, and Section 1590 of the FGC (also adopted as part of the MMAIA), provide authority to the Fish and Game Commission to undertake this reclassification process, as it may “designate, delete, or modify *state marine recreational management areas established by the Commission for hunting purposes, state marine reserves, and state marine conservation areas.*” It should be noted that the statute does not explicitly state that the Commission’s authority extends to areas *established by legislation*, although that could well be implied from a reading of the MMAIA in its entirety.

Notably, however, the Legislature did not itself reclassify the statutorily-established marine life refuges in Article 6 of Chapter 2, Division 7 of the FGC at the time it adopted the MMAIA. Nor has it taken action since to remove any of the legislatively-created areas from the statutes.

3. MMAIA Re-Classification Exercises by the Fish and Game Commission

In 2004, the Department and Commission undertook to re-designate the state's existing array of MPAs following the classification scheme identified in Section 36700 of the PRC (OAL ID # Z04-1005-08). In so doing, it followed the direction (Section 36750, PRC) to consider the management purpose and level of resource protection at each site. The statutory language defining and prescribing activities which may take place in the Dana Point Marine Life Refuge was most closely aligned with the definition of a "State Marine Park" provided in subdivision 36700(b) of the PRC, which allows for recreational but not commercial opportunities (Subdivision 36710(b), PRC).

The State Inter-Agency Coordination Committee, established by Section 36800, PRC, was charged with reviewing proposals for new or amended MMAs to ensure consistency in the use of designations throughout the state. The Committee reviewed the Department and Commission's proposal to reclassify all existing MPAs in the state's marine and estuarine waters, and to incorporate them into the Commission's regulations in Subsection 632(b), Title 14, CCR. The State Inter-Agency Coordination Committee concurred with the proposed reclassifications prior to the Commission's adoption of the regulations in December, 2004

As a result, the area known as the Dana Point Marine Life Refuge was incorporated into the Fish and Game Commission's regulations as the "Dana Point State Marine Park" in Section 632, Title 14, CCR. Other than the name, there is no difference between the regulations and the statutes that remain in the FGC. Along with the Dana Point MPA, the Commission also re-classified the six other Orange County marine life refuges as state marine parks as well.

Shortly thereafter in 2005, members of the California Lobster and Trap Fishery Association reminded the Department and the Commission that the "gentlemen's agreement" had remained in effect until the present, whereby the statutory prohibition on commercial lobster harvest was not enforced in any of the Orange County marine life refuges. In response to this request, and recognizing that these areas had been commercially fished for many years under the gentleman's agreement, the Department proposed, and the Commission adopted, a compromise package, recognizing that fishermen that relied on these areas could suffer a substantial economic hardship if all seven areas were all closed to commercial harvest. The proposal called for transforming six of the seven Orange County refuge areas to state marine conservation areas from state marine parks, thereby allowing commercial harvest, but limited the commercial activity to commercial lobster fishing only.

The Department selected to maintain the Dana Point area as the one MPA that

should remain closed to commercial fishing due to the more specific nature of the restrictions provided in FGC Section 10667. This proposed change (OAL ID #s 05-0510-09 and 05-0621-16) became effective on November 2, 2005.

However, although commercial lobster fishing is now permitted in six of the seven areas, the fishermen who relied on waters within the Dana Point State Marine Park now request that the Commission re-classify the seventh area from a State Marine Park to a Marine Conservation Area, as it did for the other six Orange County refuge areas.

4. Current Understanding of MPA Modification Processes

Upon further review of the MMAIA and how it interrelates with the Marine Life Protection Act (MLPA) legislation (Ch. 1015, Stats. 1999), it appears that actions to modify existing MPAs must be consistent with the MLPA statutes. In the 2005 rulemaking (OAL ID #s 05-0510-09 and 05-0621-16) that reclassified the six other State Marine Parks to State Marine Conservation Areas, the authority cited was Section 1590 of the FGC, codified with adoption of the MMAIA.

However, the Department now does not believe Section 1590 of the FGC was the proper source of authority to “modify an MPA” when one is looking to modify an MPA that was originally designated by the Legislature, as opposed to one originally established by the Commission. This belief is founded upon express statutory provisions that suggest that the Commission must look to the entity that established the MPA before determining if they have authority to modify its original classification. For example, Subdivision 36725(a), PRC states that if the State Parks and Recreation Commission designates an MMA, the (Fish and Game) Commission may not have any authority to modify or delete the area, depending on its classification.

Moreover, as described in item 2 above, the plain language of Section 1590, may limit the Commission’s ability to “designate, delete or modify” MPAs to only: a) state marine recreational management areas established by the Commission for hunting purposes, b) state marine reserves, and c) state marine conservation areas. No mention is made of legislatively-created marine life refuges. Moreover, this language does not appear to allow for transformation of a state marine park into a state marine conservation area, since state marine parks are not identified in the list of items the Commission may “designate, delete or modify.”

Additionally, Subdivision 10502(d), codified in the general provisions pertaining to refuges and other protected areas, states that the Commission may make additional regulations *not in conflict with any law* for the protection of birds, mammals, fish, amphibian, and *marine life within any refuge*.

Most importantly, Section 2861 of the FGC, codified with the MLPA, entitled “Modification of MPAs,” which contains the following language:

(a) The Commission shall, annually until the master plan is adopted and thereafter at least every three years, receive, consider, and promptly act *upon petitions from any interested party, to add, delete, or modify MPAs*, favoring those petitions that are compatible with the goals and guidelines of this chapter.

(b) Prior to the adoption of a new MPA or the modification of an existing MPA that would make inoperative a statute, the Commission shall provide a copy of the proposed MPA to the Legislature for review by the Joint Committee on Fisheries and Aquaculture or, if there is no such committee, to the appropriate policy committee in each house of the Legislature. (emphasis added)

The Department now believes that Section 2860, established with the MLPA, which allows the Commission to regulate commercial and recreational fishing and any other taking of marine species in MPAs, along with Section 2861 which requires the Commission to annually review petitions to add, delete, or modify MPAs, are the statutes that are most on-point to address the situation at hand. This is a request from an interested party (lobster fishermen) to modify an existing MPA that was established by statute. Therefore, the Department believes that while the Commission clearly has authority to modify existing MPAs that it has previously created, special rules apply for those MPAs that were established by the Legislature itself, pursuant to FGC Subdivision 2861(b).

The Department recommends that the Commission proceed with providing a copy of the change to the Joint Committee on Fisheries and Aquaculture as described in FGC Subdivision 2861(b), prior to adoption of the proposed change to convert the Dana Point State Marine Park to the Dana Point State Marine Conservation Area, a change that is necessary in order to grant the industry's request to allow commercial lobster harvest in the area.

5. Commercial Lobster Fishing Activity in the Dana Point MPA, 2000-2004

Members of the California Lobster and Trap Fisherman's Association have requested the proposed change based on a claim of economic hardship. If regulations continue to define the area as the Dana Point State Marine Park, commercial fishing, including lobster fishing, will remain prohibited. Presently, there are approximately 220 individuals that are authorized to fish for lobster in California, under authority of a commercial lobster operator permit.

It is common practice for individual lobster fishermen to fish with trap gear consistently in the same areas. Unlike coastal pelagic fisheries which are generally not affiliated with particular bottom types or areas, lobster fishing is done only in rocky reef or kelp forest habitat. Most lobster fishing in California takes place south of Point Conception in water less than 150 feet deep along the coast or at offshore islands.

All commercial lobster fishing must be done with traps. While there is no limit on the number of traps a commercial lobster permittee may use, traps must be serviced at least once every 96 hours, weather permitting, pursuant to FGC Section 9004.

Consequently, the lobster fishery can be described as one where access to specific areas is very important. Most lobster fishermen fish only in a few particular areas, and set their traps in densities based on their prior experience working the area. To maximize productivity, fishermen set traps in a way that strikes the best balance between too large a distance between traps (inefficient use of time and labor) and too little distance between traps (resulting in low yields per trap). While there is some amount of overlap in areas that fishermen work, it is relatively uncommon to see more than a few fishermen working a particular area, such as a specific reef, cove, point or kelp bed.

For those lobster fishermen that previously relied on the Dana Point MPA area as part of their “turf,” continuing to lose the area to future commercial fishing would likely result in some degree of economic hardship. Meanwhile, a large majority of the 220 permitted lobster fishermen are not impacted by the closure, as their records show they have never fished in block 757. However, because commercial lobster fishing data are collected at the block scale and since the Dana Point State Marine Park only encompasses a small portion of block 757, the Department is unable to precisely quantify how many individuals previously fished the area, or how much the catch from this area may be worth.

6. Economic Impact Based on Landing Receipt Information

The Department requires that fishermen or buyers record the general location of where the catch was made on the fish receipt at the time of sale. Unfortunately, commercial landing receipts do not have the resolution needed to determine if the catch was made inside or outside the Dana Point MPA. Landing receipts require only that the buyer list the “fishing block” where the catch was made.

The Dana Point MPA falls entirely within block 757, which includes about 70 square nautical miles of ocean area (see Figure 1). The Dana Point MPA encompasses only about 0.16 square nautical miles of this area. However, since

lobster fishing generally only takes place in water less than 150 feet deep, most of the ocean area falling within block 757 is not utilized for lobster fishing. Therefore, in trying to determine what percentage of the block 757 catch might have originated from waters within the Dana Point MPA, it would be incorrect to consider the entire area of block 757. Only the shallow waters along the coast should be included in any calculation.

The Department has considered two possible ways to estimate the percentage of the block 757 catch attributable to the Dana Point MPA. First, all of the 0.16 square nautical miles inside the MPA area is 60 feet and less in depth, while 4.4 square nautical miles of the total area in block 757 is 60 feet and less, based on bathymetric information. That would mean about 3.6 percent of the block 757 area that is 60 feet and less in depth falls within the Dana Point MPA. Therefore, it is possible that about 3.6 percent of the block 757 catch comes from the Dana Point MPA, if all lobster catch in block 757 came from waters 60 feet and less, and all areas 60 feet and less were considered equal in terms of their habitat value for producing lobster.

Alternatively, looking at the length of coastline included within the Dana Point MPA relative to the length of coastline that falls in block 757 may be appropriate. The Dana Point MPA spans 0.56 nautical miles of coastline, while there is about 5.6 nautical miles of coastline in all of block 757 (see Figure 1). That would mean about 10 percent of the block 757 catch could have come from the Dana Point MPA if all areas of the coastline in the block were considered equal in terms of their habitat value for producing lobster.

However, the Department recognizes that in fact, not all of the water less than 60 feet, nor the entire block 757 coastline, is equal in terms of its habitat value for producing lobster. There are areas of rocky reef habitat in block 757 that fall both inside and outside of the Dana Point MPA that could support commercial lobster fishing. Likewise, there are areas of shallow sandy habitat in block 757 that occur both inside and outside the Dana Point MPA, which are not suitable for commercial lobster fishing. Therefore, the Department cannot say that either of the potential methods of calculation described above is very precise. However, the Department can say with certainty that it would be incorrect to attribute all of the block 757 catch as having originated from the Dana Point MPA.

Despite the impossibility of determining how many individuals previously fished in the area, and what percentage of the block 757 catch comes from the Dana Point MPA, the landing receipt information that lists block 757 still provides some baseline information that may be helpful in determining the degree of economic impact that may result from continuing to close the area to commercial lobster fishing.

The Department evaluated commercial lobster landing receipts for four seasons (2000-2003), where each season begins in October and runs through the March of the following year. Catch information for the two most recent seasons was not included in the analysis because the new regulations closing the Dana Point area to commercial harvest were in effect during all or part of those seasons.

Over the 2000-2003 seasons, block 757 catch averaged just over 35,000 pounds per season, compared with an average statewide total of 695,000 pounds per season. Therefore, the catch from block 757 produces approximately 5% of the statewide total.

The median price paid to fishermen statewide over this 4-year period was \$7 per pound. Therefore, block 757 produced approximately \$245,000 worth of lobster in each of these seasons.

In the 2000 season, landing receipts with catches recorded as originating from block 757 showed that 28 individual permittees landed catch from this block area. In 2001-2003, there were 24, 25 and 22 individuals respectively. So, on average each season, 25 permittees fishing in block 757 earned a total of \$245,000 from the sale of their catch. If equally distributed this comes to about \$9,800 per permittee. The other approximately 195 lobster fishermen in the state did not participate in lobster fishing in block 757, and thus had no earnings from the area.

However, the landing receipts show that in fact, the catch was not equally distributed between the 25 individuals. In looking at the maximum possible economic loss to a single individual, the person with the highest catches from block 757 landed an average of just under 4,000 pounds in each of these four seasons, meaning that this individual would lose approximately \$28,000 per season if he or she could not catch that lobster from another location, and if all of those catches recorded from block 757 originated from waters within the Dana Point MPA.

7. Department Conclusions on Impacts

As described above, it may be reasonable to estimate that only 10 percent or less of the catch from block 757 comes from waters within the Dana Point MPA.

Therefore, if commercial lobster fishing were to remain closed in the Dana Point MPA, the estimated degree of impact might be that 2.5 individuals would be impacted at a level of \$9,800 each per season, or alternatively, 25 individuals would be impacted at a level of \$980 each per season, or some combination in between. The highest potential impact to any individual could be no more than

\$28,000 per year and, if so, the impact to other individuals would necessarily be less.

Given that usually only a few fishermen work a particular area such as the MPA, it is probably more likely that the impact would be to few individuals each at a greater degree. This estimate also assumes that catch could not be made from some other nearby location open to lobster fishing, although recent information from other MPAs suggests that when fishermen are faced with closed areas, they often mitigate by relocating to areas that remain open. Analyses of newly established MPAs have shown that lobster fishermen are able to land the same volume of lobster as they did prior to the closure.

However, even if 100 percent of the catch from block 757 came from the Dana Point MPA, the maximum impact would be approximately \$245,000 per year; about 5 percent of the total value of the fishery statewide.

In summary, the Department's evaluation of the economic impact of the present Dana Point State Marine Park designation to the lobster fishery as a whole is negligible, relative to the \$4.87 million average seasonal value of the fishery statewide.

8. Technical Changes to Subsection 632(b), Title 14, CCR

As described above, the Commission previously took action to re-classify the six other Orange County marine life refuges from state marine parks to state marine conservation areas (OAL ID #s 05-0510-09 and 05-0621-16), which became effective on November 2, 2005. Additional language is now proposed to make clear that the regulations established in Subsection 632(b), Title 14, CCR, supercede the statutes establishing these marine life refuges and prescribing the terms of their use.

The proposed addition to the regulatory language would make clear that that pursuant to the Commission's authority in Fish and Game Code Section 2860 to regulate commercial and recreational fishing and any other taking of marine species in MPAs, Fish and Game Code Sections 10500(f), 10500(g), 10502.5, 10502.6, 10502.7, 10502.8, 10655, 10655.5, 10656, 10657, 10657.5, 10658, 10660, 10661, 10664, 10666, 10667, 10711, 10801, 10900, 10901, 10902, 10903, 10904, 10905, 10906, 10907, 10908, 10909, 10910, 10911, 10912, 10913, and 10932 are made inoperative as they apply to Subsection 632(b).